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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MAURICE LEON VENABLE, Defendant and Appellant.	B237315 (Los Angeles County Super. Ct. No. TA117553)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as modified with directions.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Maurice Leon Venable, of first degree murder (Pen. Code,[1] § 187, subd. (a)) and firearm possession by a felon (§ 12021, subd. (a)(1)). The jury found the personal firearm use (§ 12022.53, subd. (d)) and criminal street gang benefit allegations to be true. (§ 186.22, subd. (b)(1)(C).) The jury further found two prior conviction allegations within the meaning of sections 667, subdivision (a)(1), 667, subdivisions (b) through (i), and 1170.12 to be true. The trial court subsequently concluded, however, that there was only one prior conviction on charges brought and tried separately under section 667, subdivision (a)(1). The trial court sentenced defendant to 105 years to life in state prison. We modify the judgment and affirm as modified.

II. THE EVIDENCE

A. The Prosecution Case

1. Overview

In December 2007, defendant murdered a fellow gang member, Clifford Ingram. Defendant walked up to Mr. Ingram, who was seated in a car. Defendant shot Mr. Ingram in the chest with a .38 caliber revolver. There was evidence the murder occurred because Mr. Ingram was a "snitch" who had filed a police report against other members of the gang. There was also evidence Mr. Ingram's drug sales were cutting into defendant's own narcotics trafficking profits. Within a few hours of the shooting, the "word on the street" was that defendant was the assailant. Nevertheless, defendant was not arrested for the murder until April 2011. In an attempt to avoid conviction, defendant threatened potential witnesses with harm if they testified.

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[1] All further statutory references are to the Penal Code except where otherwise noted.

2. Brent Exley

Defendant and Mr. Exley were members of the same criminal street gang. Mr. Exley was 31 years old at the time of trial. He had been a gang member since he was 13 years old. The parties stipulated that Mr. Exley had previously been convicted of felonies on three occasions in 1998, 2001 and 2004. On several occasions prior to the murder, defendant had spoken to Mr. Exley. Defendant expressed a desire to kill Mr. Ingram. A week prior to the murder, Mr. Exley and defendant saw Mr. Ingram driving up a street. Mr. Ingram got out of his car and dropped something. It sounded to Mr. Exley as though the thing Mr. Ingram dropped could have been a gun. Defendant tried to retrieve his pistol. When asked why defendant was trying to get his weapon out, Mr. Exley testified: "Because it's on like. It's on sight." However, as defendant reached for his weapon, he crashed into a van that had pulled out in front of him. Defendant drove away.

On December 22, 2007, Mr. Exley was riding a bicycle on patrol in the neighborhood, looking for rival gang members. Mr. Exley saw Mr. Ingram. Mr. Ingram was sitting in his parked car in the middle of 131st Street. Mr. Ingram was talking to Terry Scott, who was standing on the driver's side of the car. Mr. Exley saw defendant pass and continue down the street. Defendant was driving his car as he continued down the street. Thirty seconds later, Mr. Exley saw defendant walk up to the passenger side of Mr. Ingram's car with a .38-caliber revolver. Defendant shot Mr. Ingram. Mr. Exley had seen defendant with the same .38-caliber revolver "plenty of times," including the week prior to the murder. (Consistent with Mr. Exley's testimony that defendant used a .38 caliber *revolver*, no shell casings were found in Mr. Ingram's vehicle.)

Later, defendant spoke to Mr. Exley. Defendant was glad Mr. Ingram was dead. In August 2008, while in custody on a parole violation, Mr. Exley told detectives that defendant shot Mr. Ingram. On December 22, 2008, someone fired on a vehicle in which Mr. Exley was riding. One of the occupants of the vehicle was killed. Mr. Exley

believed that, because of his trial testimony, he was at risk of being killed by gang members.

3. Mr. Scott

Mr. Scott was 50 years old at the time of trial. On December 22, 2007, around noon, Mr. Scott was in front of Michael and Kelvin Randle's house.[2] Mr. Ingram pulled up in his car. Mr. Scott walked over to the driver's side window. Mr. Scott and Mr. Ingram spoke for a few minutes. As they were talking, Mr. Scott saw a hand holding a small revolver come through the passenger side window. Mr. Ingram lifted his arm as if to protect his head. Mr. Scott heard a pop and dropped to the ground. Mr. Ingram's car rolled backwards and crashed into a fence. Mr. Ingram's assailant ran toward Flora Jones's house.

On July 17, 2008, while in custody, Mr. Scott described the shooting to Detective Richard Biddle. The interview was recorded. Mr. Scott said he was kneeling down talking to Mr. Ingram. Mr. Ingram was in the driver's seat of his car. A Black male approached on the passenger's side, stuck his arm through the window with a gun in his hand and said, "What now, motherfucker?" The gunman fired once. Detective Biddle asked Mr. Scott whether defendant fired the shot. Detective Biddle referred to defendant using a gang moniker. Mr. Scott said he knew the person Detective Biddle was referring to. But Mr. Scott was uncertain the person referred to by Detective Biddle shot Mr. Ingram. In response to Detective Biddle's question about defendant's gang moniker, Mr. Scott said, "That he knew him, he knew him from the neighborhood for a long period of time, that he knew he was a gang member and that the neighborhood was afraid of him, that he would terrorize everybody in the neighborhood." Mr. Scott declined to look at any photographs. Later, Detective Biddle and a partner, described only as Detective

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[2] For the sake of clarity, we refer to Michael and Kelvin Randle by their first names.

Hall, walked Mr. Scott back to a cell. Mr. Scott said something like: "You'll solve the case. You're looking at [the] right guy."

Mr. Scott was reluctant to testify at trial. Mr. Scott acknowledged telling two detectives the person who shot Mr. Ingram was a Black male with a shaved head wearing a black jacket and jeans. Mr. Scott further acknowledged telling the detectives Mr. Ingram's assailant ran towards Ms. Jones's house. Mr. Scott denied telling the detectives the assailant said, "What now, motherfucker." Mr. Scott also did not recall telling the detectives he saw the person who shot Mr. Ingram walk up to the car. Mr. Scott denied telling Detective Biddle: "You guys will solve the case. You know who did it. You have the right guy[.]" Mr. Scott denied telling Kelvin or Stephanie Riley, Mr. Ingram's fiancée, that defendant fired the fatal shot. Detective Biddle asked Mr. Scott whether a list of potential witnesses had been the subject of discussion in the community where the shooting occurred. Mr. Scott denied such a list existed.

4. Ms. Riley

Mr. Ingram's fiancée, Ms. Riley, saw Mr. Scott "a couple of days" before Mr. Ingram's funeral. Mr. Scott told Ms. Riley that he was talking to Mr. Ingram when defendant came up to the car on the passenger side with a gun, opened the door, and shot Mr. Ingram. At trial, Mr. Scott denied making those statements to Ms. Riley. Ms. Riley did not report this conversation with Mr. Scott until September 20, 2011—when Detective Biddle came to her house with a subpoena. This was two weeks before she testified at trial. Ms. Riley was frightened because her name was on a list of witnesses that was circulating in the neighborhood.

5. Tracey Johnson

Ms. Johnson was in her mid-eighties at the time of trial. On December 22, 2007, she was walking to a store with her two grandchildren when she saw a car parked near

the Randles' house. It was stopped towards the middle of the street. Ms. Johnson saw Mr. Scott talking to the driver. Then the car started to roll backwards. Defendant ran past Ms. Johnson holding a gun in his hand. Ms. Johnson was certain that defendant was the person she saw with the gun. Defendant ran into Ms. Jones's yard. On the day of the shooting, Ms. Johnson gave a police officer a description of the man who ran into Ms. Jones's yard. Ms. Johnson also said she thought she knew him. The man was a friend or ex-friend of her brother.

Nearly three years after the murder, on October 14, 2010, Ms. Johnson told Detectives Hall and Biddle that she had witnessed the shooting. She was unable, however, to recall defendant's name. Ms. Johnson testified, "[I]t was at the tip of my tongue, but I couldn't get it out." Detective Biddle mentioned a person using a gang moniker. Ms. Johnson told Detective Biddle she did not know who that was. Detective Biddle also used the named "Maurice" at some point. Ms. Johnson told Detective Biddle: "I know his peoples. I'm not sure. It's on the tip of my tongue. Let me think about it. I'll come up with it." Detective Biddle showed Ms. Johnson a picture of defendant. Ms. Johnson said the person in the photograph looked "too old."

One month later, on November 12, 2010, when Detectives Biddle and Hall returned, Ms. Johnson identified defendant by name. The detectives asked whether Ms. Johnson remembered the name of the person who fired the fatal shot. Ms. Johnson answered: "Oh, Venable. Venable." She added, "Maurice, I think it's Maurice." At trial, Ms. Johnson positively identified defendant as the man who ran past her with a gun in his hand. Also on November 12, 2010, Ms. Johnson told the detectives that since their October visit, she had been threatened to keep her mouth closed. An unidentified individual approached Ms. Jonson's grandchildren. The man told Ms. Johnson's grandchildren to tell Ms. Johnson to keep her mouth closed, not to go to court, or she would suffer.

Ten months later, on September 20, 2011, Detectives Biddle and Hall returned with a subpoena. Ms. Johnson told them that in June 2011, Mr. Scott had shown her a list with witnesses' names on it, including her own name. The names on the list included

Michael, Kelvin, Terry, Jennie, Oscar, Carlos, Tracey and Stephanie. Mr. Scott got the list from someone who had been in jail with defendant. The man told Mr. Scott the witnesses needed to watch their backs. About a week later, a man came to Ms. Johnson's house. He pointed to a list and asked Ms. Johnson, "This is you?" She said, "No, it's not." The man said: "Well, you're Falcon's sister, so this is you. You need to watch your back." (Falcon was Ms. Johnson's brother's nickname.) The man said there would be consequences if she came to court. Ms. Johnson had a daughter and grandchildren. As a result, Ms. Johnson feared for their safety. Before she testified, Ms. Johnson saw the man who had threatened her in the courtroom. At trial, Michael, Kelvin and Mr. Scott all denied they had been threatened.

6. Michael

Michael was reluctant to testify at trial. Michael denied seeing Mr. Ingram drive up in front of his house. Michael denied telling Detective Biddle that Mr. Ingram drove up to the house. Michael did, however, see Mr. Ingram parked in the middle of the street and talking to Mr. Scott. He denied witnessing the shooting. Michael could not remember having a conversation with Detective Biddle during which a conversation with Mr. Scott was discussed. The following transpired: "Q Do you remember having a conversation with Detective Biddle, and you told him that [Mr. Scott] he asked you who told you [Mr. Ingram] had been shot, and you told him [Mr.] Scott? [¶] A No, I don't remember that. [¶] . . . . Q … Did [Mr.] Scott tell you that [Mr. Ingram] had been shot? [¶] A No, it's not true."

7. Kelvin

Detectives Biddle and Hall interviewed Kelvin on October 14, 2010. The interview was recorded. Kelvin said the person who shot Mr. Ingram ran to Ms. Jones's house and tried to enter the residence. Ms. Jones was Kelvin and Michael's aunt. A

week or two later, Kevin asked defendant, "What the fuck you doing with my auntie's house?" Defendant offered no explanation.

Kelvin testified at trial. Kelvin spoke to Mr. Ingram in front of the Randle house on December 22, 2008. Kelvin went back inside the house while Mr. Scott continued to speak with Mr. Ingram. Kelvin was indoors when he heard what sounded like a fire cracker. His sister, Jennie, who was on the porch, started screaming. Then Kelvin heard a boom. Kelvin then went outside. Kelvin saw Mr. Ingram's car backed into a wall at the corner. Mr. Ingram's head was on the steering wheel. Kelvin denied discussing statements by Mr. Scott concerning the shooting with Detective Biddle. Kelvin denied telling Detective Biddle that Mr. Scott claimed to have seen the shooting. Kelvin testified Mr. Scott never said Mr. Ingram's killer had run towards Ms. Jones's house.

8. Detective Brian Richardson

Detective Richardson was a gang investigator. He had been gathering intelligence on defendant's gang since about 2001. The gang had approximately 225 documented members, some of whom were in prison. Detective Richardson had known Mr. Ingram since 2000 or 2001. Mr. Ingram was an older, respected member of the gang, an "original gangster." Mr. Ingram was involved in the day-to-day operations of the gang. He had been shot in the past. Detective Richardson had seen defendant in the gang neighborhood. But Detective Richardson did not know defendant personally. Detective Richardson never had any personal contact with defendant. Defendant had multiple gang tattoos and was an admitted gang member. He was an active gang member in 2007. Detective Richardson explained the importance of respect in gang culture: "Respect is very huge. They require respect. If they don't get the respect, the word gets out, and one of their rivals probably would come in there and commit assaults on them." The deputy district attorney posed a hypothetical situation where two older gang members disrespected one another. Detective Richardson explained that the older gang member who was disrespected would have to take action: "He would have to take action and he

will lose respect in the eyes of the gang. Again, he would definitely lose respect from the younger members of the gang." By committing violence against a disrespecting gang member, the other's stature would be elevated within the gang structure. Committing violence on a fellow gang member who disrespected an "original gangster" would elevate the assailant's stature in the gang. Control of the drug trade within a gang's territory is crucial because it brings in money which in turn buys cars and guns. Detective Richardson also testified that a gang member who filed a police report implicating other gang members would be viewed as a "snitch" and subject to retaliation.

The deputy district attorney asked Detective Richardson the following hypothetical question: "Let's assume that there is an [original gangster]; he's older, well respected in the gang; and he has a dispute with another [original gangster], another well-respected member of the gang; and the dispute is because the first guy called the police on some younger gang members for vandalizing his house, and he filed a report; and then this got out in the gang and they began discussing this . . . snitch, this [original gangster] who cooperated with the police, and they also determined that he was selling dope in areas that he shouldn't be selling; [¶] So in broad daylight, on a residential street in an area well within gang territory, one [original gangster], who had expressed on prior occasions a desire to kill this guy, goes up to his car, reaches his hand in and shoots him one time in the back. [¶] Now, sir, do you have an opinion whether that crime was committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members?" Detective Richardson answered affirmatively. He explained: "Because . . . we've talked about snitching. Especially from your own gang. Now, it's almost as if that trust was broken and so the gang feels a little—they can't really get away with some of the crimes that they commit because someone from their own circle has informed them to the police. [¶] So, again, you have to—now you have fear and intimidation. There's a big fear and intimidation factor. [¶] The mere fact that this individual told the police and then, as you said, the other individual went and told the younger gang members and then later on he has killed, that's fear and intimidation not only to the good people that live in

the neighborhood, to the gang members. There's fear and intimidation of individuals within their own gang, not just the good people that live inside of the neighborhood. So that is my opinion. It's for the benefit of the gang."

Detective Richardson was also asked: "And how about . . . the fact that the killer, the older gangster, also felt like his contemporary, the victim, was selling dope where he shouldn't be selling dope? Do gangs regulate where members can sell dope?" Detective Richardson responded: "Yes. Yes, they do. Yes, they do. [¶] My opinion on that, it would be more of a status, individual status for that—for that gang member, especially if he's an older gang member. The mere fact that he is trying to—he's not happy with another gang member that's selling dope, it tells me that he's a shot-caller, first of all, someone that has a lot of—he has seniority within the gang. So he's an [original gangster]. [¶] Also . . . he's doing it for his own status. It's building his status within the gang."

B. The Defense Case

Defendant testified. He was 49 years old at the time of trial. He admitted an extensive criminal history dating back 30 years. But defendant denied having any problem with Mr. Ingram. Defendant denied any involvement in Mr. Ingram's murder. He denied any attempt to dissuade witnesses from testifying.

III. PROCEEDINGS RELEVANT TO DEFENDANT'S SUPPRESSION OF EVIDENCE CLAIM

Mr. Exley was in custody on a parole violation—failure to report to a parole officer—in August 2008. In August 2008, Mr. Exley told police officers that defendant shot Mr. Ingram. Mr. Exley testified he was not sure why he decided to approach the police at that time. But he was tired of the gang life. He had a girlfriend, and they had a child together. The child was born in April 2008. Mr. Exley wanted to get away and

take care of his family. He had not been promised anything or offered any money to testify. Mr. Exley had been back to prison on parole violations twice since August 2008. No one had intervened to his benefit.

One week before trial began, defense counsel, Connie R. Quinones, received "a very general tip" from the pre-trial prosecutor, Deputy District Attorney Anthony Aguilar. Mr. Aguilar said Mr. Exley might have given information to law enforcement officers in connection with a previous case. This case was subsequently assigned for trial to Deputy District Attorney Steven Dickman. One week prior to the start of trial, Ms. Quinones spoke to Mr. Dickman about Mr. Exley. They discussed whether Mr. Dickman discussed the informant issue with the officers assigned to his case.

On cross-examination, Ms. Quinones questioned Mr. Exley at length about his arrests subsequent to August 2008 and his relationship with law enforcement officers. Mr. Exley admitted that on May 5, 2010, he was arrested on a weapons charge. But the district attorney refused to file any charges. According to Mr. Exley, there was insufficient evidence he had been in the car in which the weapon was found. Mr. Exley testified he did not usually cooperate with police officers: "Q. Since 2008, when you gave the police officers a statement, you've never been charged with any crimes - - correct? - - even though you've been arrested? [¶] A I've been arrested once, yeah. [¶] Q Just once? [¶] A I've been arrested for violations, yeah. [¶] Q Well, violations come with new cases. [¶] A Naw, not - - all violations don't come with new cases. [¶] Q But you have been arrested for separate offenses other than your violation. That just attaches to them. [¶] A Yeah. [¶] Q But never been charged? [¶] A The gun case, that's what I was arrested for. [¶] Q Never been charged? [¶] A Yeah. [¶] . . . . Q By Ms. Quinones: Have you ever given information on other murders? [¶] A Naw. [¶] Q You've never - - [¶] A On other murders? [¶] Q Yes. [¶] A Naw. [¶] Q Isn't it true that you gave information to detectives from the Los Angeles County Sheriff's about other murders to solve them in order for you to get preferential treatment? [¶] A Naw. [¶] . . . . [¶] Q By Ms. Quinones: Isn't it true that you speak to the sheriffs every time you're in custody about cases they're trying to solve? [¶] A I mean, they - - the police

come talk to me every time I'm in jail. [¶] Q So you talk when you're in jail, but you don't talk when you're out? [¶] A I mean, that's the only time they can catch me. [¶] Q You said that they - - they stop you when you're out. [¶] A Yeah. [¶] Q And you don't talk to them then? [¶] A Yeah. Yeah. You out there on the street, they ain't going to really ask you too much. [¶] Q Come on now. You know they ask you a lot of questions. [¶] A They don't do that - - when they stop you, they don't really talk to you like that. [¶] Q You're saying they don't - - they don't ask you particularly? [¶] A Well, I mean, they probably do ask certain people, but I ain't never had no incident where they just plain started asking me a whole bunch of questions about something on the street. [¶] Q So you seem pretty special, both in your hood and with the police department; is that true? [¶] A I mean, I - - that's - - I don't know how - - how I can answer that. [¶] Q Well, what I'm asking you is: Do you provide information so you don't get arrested on certain crimes? [¶] A Well, they never - - I ain't never had no police tell me, 'Oh, if you tell me something, I'm not going to arrest you,' because, as you can see, I sent to jail every time. [¶] . . . [¶] Q My question is just simple: You've never been charged with a new crime since August 5 of '08 - - [¶] A Correct. [¶] Q - - when you gave your statement; is that right? [¶] A Yeah. [¶] . . . [¶] Q By Ms. Quinones: You told us on direct examination that you don't like police? [¶] A Yeah. [¶] Q But yet - - and that you don't cooperate with them. Or nearly? [¶] Q But this particular time you decided to cooperate with them? [¶] A Yeah.

Ms. Quinones also questioned Detective Richardson about discussions with Mr. Exley: "Q Do you know Brent Exley? [¶] A Yes. [¶] Q Do you know Mr. Exley because of contacts you've had with him? [¶] A Yes. [¶] . . . [¶] Q And have you personally had contact with Brent Exley? [¶] A Yes. [¶] Q Is Brent Exley a cooperative gang member with your police department? [¶] . . . [¶] Q . . . Do you use Brent Exley as a snitch? [¶] The Court: Why don't you approach."

The trial court held an in camera hearing. With the agreement of the Attorney General, the transcript of the in camera hearing has been unsealed. Detective Richardson testified he regularly interviewed gang members who had been arrested. Mr. Exley was

one such gang member. Under sheriff's department policy, Detective Richardson could not use Mr. Exley in any way as an informant. But Mr. Exley had given Detective Richardson information on seven or eight occasions. The information led Detective Richardson in the right direction in various investigations. Detective Richardson had not gotten any information from Mr. Exley prior to the date of Mr. Ingram's murder. Detective Richardson's contact with Mr. Exley began in around June 2009. This was after Mr. Exley told investigators—in August 2008—that he had witnessed the present murder. But Detective Richardson did not know about Detective Biddle's August 2008 interview with Mr. Exley. Detective Biddle first told Detective Richardson that Mr. Exley was an eyewitness in this case on the day prior to the preliminary hearing, July 26, 2011. Detective Richardson testified, "I was shocked."

Detective Richardson had never given Mr. Exley any money. Detective Richardson had not made Mr. Exley any promises of help in any criminal matter. Detective Richardson had not provided Mr. Exley with any benefits at all. In their conversations, Mr. Exley never explained what his motive was in providing information to law enforcement. Detective Richardson testified concerning Mr. Exley's arrest on the gun charge: "He had a case where he was in a car with another gang member that . . . I was investigating. I had never . . . even met [Mr.] Exley. [¶] The other gang member runs with a gun. And when I got . . . there, the deputies tell me they take [Mr.] Exley to jail. Later on I believe they found the other gang member also. So they took both of them to jail. The gun was never found on [Mr.] Exley. The gun was found on the other gang member. I believe that he thought I did him . . . a favor . . . because it was a D.A. reject on that case on him. I had nothing to do with that D.A. reject. The gun wasn't found on him. [¶] And I believe him that's why he started . . . giving me information. But I never promised him anything." In fact, Detective Richardson had nothing to do with the prosecutor's refusal to file a complaint in Mr. Exley's weapons case.

Ms. Quinones argued Mr. Exley's credibility was in question if he cooperated with the police as an informant and received some type of benefit for doing so. She noted that no new case had been filed against Mr. Exley since at least 2007. Ms. Quinones stated:

"I would like to ask [Detective Richardson whether] Mr. Exley is a snitch. I know I'm not going to get into details about which cases. That's not my interest. I just want to know if he is a snitch, how long, what dates so that I can compare them perhaps with the times that he's been in custody, whether or not he's been in custody while he's given information, when it started, when was the last time. From what I hear, it's a couple of weeks ago. Those kinds of questions." Mr. Dickman responded that Mr. Exley had not received any benefit of any kind. The trial court denied Ms. Quinones's requests for dismissal or for a mistrial. The trial court ruled Ms. Quinones could ask Detective Richardson: "Has [Mr. Exley] given information to you in the past?" and, if yes, "Did he get any benefit from it?" The trial court subsequently denied Mr. Quinones's request for a jury instruction with respect to the belated disclosure.

When proceedings resumed with the jury present, Ms. Quinones questioned Detective Richardson as follows: "Q . . . [¶] You are aware of – you know Brent Exley? [¶] A Yes. [¶] Q And you've used Brent Exley as a snitch? [¶] Mr. Dickman: Your Honor, we're going to object to the form of the question. 'Snitch' is vague. [¶] The Court: Sustained. [¶] Q By Ms. Quinones: Have you gotten information from Brent Exley before on other cases? [¶] Mr. Dickman: We're going to object as to the timing as to[o] vague. [¶] The Court: You can clear it up. But 'other cases' might be vague. Go ahead. Sustain on that. [¶] Q By Ms. Quinones: Other cases where you have used Brent Exley to get information for prosecution? [¶] Mr. Dickman: Again, we're still objecting as 'other cases,' time frame and the form of the question is vague. [¶] The Court: Sustained. [¶] Q By Ms. Quinones: Have you used Brent Exley in the past before today's date as an informant on any cases in the last five years? [¶] A Yes. [¶] Q Has he received any benefit for that, monetarily? [¶] A No. [¶] Q Has he received any other benefit for his - - in exchange for his cooperation with law enforcement? [¶] A No. [¶] Q That's your personal knowledge? [¶] A Yes, just my personal knowledge."

Detective Biddle gave consistent testimony on cross-examination: "Q . . . So you interviewed [Mr. Exley] in custody? [¶] A Correct. [¶] Q And he gives you

information because he says he's changing his life? [¶] A No. Initially when I first got there and I'm escorting him from the holding cell to the interview room - - [¶] Q Yes. [¶] A - - He says, I've got information on a murder. Can you help me on a parole violation? [¶] And I tell him, 'no.' [¶] Q And you said it straight-out. 'I can't make you any promises.'? [¶] A I can't help him. [¶] Q And you made that very clear?[¶] A Correct."

Ms. Quinones discussed Mr. Exley's credibility in closing argument: "He told you that he doesn't even talk to police. He says, 'I generally don't cooperate with police.' And I asked him that because I have to tell you I had a feeling that he was someone who cooperated with the police, and that came to fruition when Detective Richardson was on the stand because as I asked Detective Richardson, 'Well, do you use him as a snitch?' We didn't even hear crickets. And he looked at the district attorney, and he looked at Your Honor. And when we came back from the sidebar, what did he tell you? 'Yes, he informs and he gives us information. But, no, we don't pay him anything and we don't give him anything.' [¶] Well, wow. Last time I heard, knew, possession of an AK-47, one of those assault rifle things, is a crime. He was caught with one and not charged. [¶] Let's contract that to [defendant]. He had possession of three bullets and he was charged and convicted. He was arrested several times in the last four years, Exley. Never charged. Do you think that's a benefit? It's a benefit. He gets these little ten-month stint parole violations. He's got serious felonies on his record. He wouldn't be looking at no ten months. [¶] He's a liar. He's unreliable and he came up here to talk about someone else to help himself, plain and simple. Nothing from his mouth was the truth. He gave you his opinion on things just to put the spin to make himself look better, would not even admit his own culpability in things."

IV. DISCUSSION

A. Defendant's Suppression of Evidence Claim

Defendant argues his conviction must be reversed because there was insufficient disclosure Mr. Exley had provided information to law enforcement officers in cases other than the present one. In addition, defendant argues Ms. Quinones should have been given latitude when cross-examining Detective Richardson. As a result, defendant argues, his due process, confrontation and effective assistance of counsel rights under the state and federal Constitutions were violated which then rendered his trial fundamentally unfair. Defendant emphasizes that Mr. Exley was the sole eyewitness to the shooting. No other witness saw Mr. Exley at the scene of the murder. Detective Biddle testified that none of the witnesses said they saw Mr. Exley on 131st and Grandee on the day of the shooting. And the only other witness to place defendant in the area, Ms. Johnson, made an unconvincing identification of defendant. Our review is de novo. (*People v. Letner* (2010) 50 Cal.4th 99, 176 (*Letner*); *People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).) As our Supreme Court held in *Letner,* "We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence. (*Salazar,* [*supra,* 35 Cal.4th] at p. 1042.)" (*Letner, supra,* 35 Cal.4th at p. 176.)

There are three components to a failure to disclose exculpatory testimony violation: first, there was evidence favorable to the accused; second, the evidence was suppressed by the prosecution; and third, there was prejudice to the defendant. (*Letner, supra,* 50 Cal.4th at p. 176; *People v. Bowles* (2011) 198 Cal.App.4th 318, 325.) Our Supreme Court has explained: "Prejudice in this context, focuses on 'the materiality of the evidence to the issue of guilt and innocence.' (*United States v. Agurs* [(1976)] 427 U.S. 97, 112, fn. 20; accord, *U.S. v. Fallon* (7th Cir. 2003) 348 F.3d 248, 252.) . . . [Materiality requires that a defendant show] a "reasonable probability of a different result."' (*Banks v. Dretke* (2004) 540 U.S. 668, 699.)" (*Salazar, supra,* 35 Cal.4th at p.

1043; accord, *Letner, supra,* 50 Cal.4th at p. 176.) The United States Supreme Court has likewise held: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682 (*Bagley*); accord, *Salazar, supra,* 35 Cal.4th at p. 1042.) Defendant bears the burden of showing materiality. (*People v. Hoyos* (2007) 41 Cal.4th 872, 918; *In re Sassounian* (1995) 9 Cal.4th 535, 545.)

The first two components are met in this case. There is no question the prosecution had a duty to disclose that Mr. Exley had provided information to law enforcement officers. Even absent a request by the defense, under the due process clause of the federal Constitution, the prosecution has a duty to disclose all evidence material to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *In re Bacigalupo* (2012) 55 Cal.4th 312, 333; *Salazar, supra,* 35 Cal.4th at p. 1042; see also Evid. Code, § 1054.1.) Suppression of evidence material to either guilt or punishment can violate due process. (*Brady v. Maryland, supra,* 373 U.S. at p. 87; *Letner, supra,* 50 Cal.4th at p. 175.) The disclosure duty exists irrespective of the prosecutor's good or bad faith and extends to impeachment and exculpatory evidence. (*Bagley, supra,* 473 U.S. at p. 676; *Salazar, supra,* 35 Cal.4th at p. 1042.) It includes material evidence bearing on a key witness's credibility. (*Giglio v. United States* (1972) 405 U.S. 150, 154; *People v. Ruthford* (1975) 14 Cal.3d 399, 408, disapproved on another point in *In re Sassounian, supra,* 9 Cal.4th at p. 545, fn. 7.) As our Courts of Appeal have specifically held: "[Under *Brady,*] [a] prosecutor's duty to disclose evidence favorable to the accused extends to evidence reflecting on the credibility of a material witness. [Citations.] This includes 'any inducements made to prosecution witnesses for favorable testimony . . . .' [Citation.]" (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380; accord, *In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.) The prosecutor's duty to disclose any inducements for favorable testimony includes information known only to law enforcement entities and not to the prosecutor. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; *Letner, supra,* 50

Cal.4th at p. 175; *Salazar, supra*, 35 Cal.4th at p. 1042.) The prosecutor has a duty to discover material evidence known to others acting on the government's behalf. (*Letner, supra*, 50 Cal.4th at p. 175; *Salazar, supra*, 35 Cal.4th at p. 1042.) Here, the prosecution failed to disclose evidence reflecting on Mr. Exley's credibility until after the trial was already in progress.

Defendant has not, however, shown that the impeaching evidence was material within the meaning of *Brady* in that he suffered prejudice. That is, defendant has not established there was a reasonable probability the result would have been more favorable to him had the impeachment evidence been timely disclosed. (*Letner, supra*, 50 Cal.4th at p. 176; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 918.) Mr. Exley was an important eyewitness. Mr. Exley identified defendant as Mr. Ingram's murderer. But Mr. Exley was not the sole witness to name defendant as Mr. Ingram's killer. And Mr. Exley's testimony was otherwise corroborated. Mr. Scott was talking to Mr. Ingram when defendant fired the fatal shot. Mr. Scott told Ms. Riley defendant shot Mr. Ingram. Certainly, at first or during the recorded interview, Mr. Scott refused to accuse defendant. Mr. Scott subsequently told Detective Biddle the authorities were looking at the right "guy"—defendant. Mr. Scott testified at trial to actually seeing Mr. Ingram's killer run towards Ms. Jones's house. Ms. Johnson testified she saw *defendant* run past her with a gun in his hand into Ms. Jones's yard. At trial, Ms. Johnson positively identified defendant as the murderer. She did so despite having been threatened. The impeachment value of this evidence is marginal. The evidence indicated that Mr. Exley provided information to a law enforcement officer on seven or eight occasions. Mr. Exley's cooperation only commenced nearly one year after identifying defendant as Mr. Ingram's killer.

Moreover, through defense counsel's questioning of Mr. Exley and Detectives Biddle and Richardson, the informant issue was thoroughly explored. Ms. Quinones extensively cross-examined Mr. Exley about his interactions with investigators. She implied, through her questions, that Mr. Exley had in fact cooperated with law enforcement officers and, in turn, been treated leniently when he repeatedly violated his

parole conditions. Detective Biddle testified Mr. Exley asked for help with a parole violation in return for information about the present murder. Detective Biddle said Mr. Exley was advised no help could be provided whatsoever. Detective Richardson specifically denied providing Mr. Exley with any benefit of any kind.

Further, the jury knew Mr. Exley was in custody on a parole violation when the first discussion with Detective Biddle about Mr. Ingram's murder occurred. The jury also knew that, although questioned by investigators previously, Mr. Exley had not come forward with the information until he was in custody. The jurors knew that Mr. Exley had subsequently provided reliable information to Detective Richardson. And there was evidence Mr. Exley had not been charged with any new cases upon violating his parole. And this occurred after Mr. Exley identified defendant as Mr. Ingram's killer. The jury heard evidence Mr. Exley was risking his life by identifying defendant. As permitted by the trial court, Ms. Quinones asked Detective Richardson whether Mr. Exley had given information in the past five years. And Ms. Quinones asked, as permitted by the trial court, whether Mr. Exley received any benefit in return. She did not seek to ask any additional questions. Defendant has not identified any possible motives Mr. Exley might have had to provide false information to the authorities that Ms. Quinones would have explored on cross-examination had she known Mr. Exley had provided information to Detective Richardson. Through testimony and argument, the jury was sufficiently apprised of the circumstances of Mr. Exley's cooperation with the authorities. There is no reasonable probability that had the undisclosed information been provided to defense counsel even earlier, the outcome would have been more favorable to defendant.

B. Cross-Examination

Defendant asserts it was reversible error to limit cross-examination of Detective Richardson concerning Mr. Exley's relationship with investigators. Defendant contends the trial court's ruling prevented production of evidence: when Mr. Exley provided information; what law enforcement agencies or officers he provided information to;

whether Mr. Exley's information proved to be reliable; and what Mr. Exley might have perceived as a potential benefit of so conducting himself. Under the Confrontation Clause of the federal Constitution, a trial court retains wide discretion to impose reasonable limits on cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679; *People v. Smith* (2007) 40 Cal.4th 483, 513; *People v. Ledesma* (2006) 39 Cal.4th 641, 704-705.) This includes an inquiry bearing on a prosecution witness's potential bias or credibility. As the Court of Appeal for the First Appellate District explained in the case of *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386: "The Confrontation Clause simply guarantees an *opportunity* for effective cross-examination; it does not assure a chance to cross-examine in whatever way, and to whatever extend, the defense might wish. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 679-680; *Delaware v. Fensterer* (1985) 474 U.S. 15, 20; *Davis v. Alaska* [(1974)] 415 U.S. [308,] 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 634; *Steele v. Perez* (7th Cir. 1987) 827 F.2d 190, 193-194.) Thus, a trial court's exercise of discretion to exclude evidence does not implicate or infringe a defendant's federal constitutional right to confront the witnesses against him, unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness's credibility. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *People v. Cooper* [(1991)] 53 Cal.3d [771,] 816-817; *People v. Jennings* (1991) 53 Cal.3d 334, 372.)" Our review is for an abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Cooper*, *supra*, 53 Cal.3d at pp. 816-817.)

There was no abuse of discretion. As discussed above, Mr. Exley, when cross-examined, testified that he had provided information to law enforcement officers while in custody. Detective Richardson likewise testified Mr. Exley had provided information. Detective Richardson said Mr. Exley's information was reliable. There was also

evidence that although Mr. Exley had requested help with a parole violation, he was clearly told no assistance would be provided. Detective Richardson said department policy prohibited using Mr. Exley as a confidential informant. Consistent with that policy, no benefit of any kind had been provided to Mr. Exley. Ms. Quinones challenged this assertion by eliciting evidence from Mr. Exley that he had been arrested on several occasions without incurring any new criminal charges against him. Ms. Quinones cross-examined Detective Richardson in line with the trial court's ruling. She made no effort to expand her inquiry while Detective Richardson was on the stand or otherwise. She did not move to strike Mr. Exley's testimony. She did not request additional time to investigate. In any event, notwithstanding the prosecution's failure to disclose the impeachment evidence earlier, Mr. Exley's testimony was placed in a fair light. And, the cross-examination placed Mr. Exley's credibility in issue. There is no showing any cross-examination was prohibited that might reasonably have produced a materially different impression of Mr. Exley's credibility.

C. Defendant's Mistrial Motion

Defendant argues the trial court abused its discretion when it denied a mistrial motion, failed to instruct the jury, and ordered no remedy in connection with the discovery violation discussed above. Our Supreme Court has held: "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court's ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555; accord, *People v. Clark* (2011) 52 Cal.4th 856, 990.) For all the reasons discussed above, we find no abuse of discretion in denying defendant's mistrial motion.

D. Jury Instruction Denial

The trial court declined to instruct the jury concerning the prosecution's failure to disclose or its untimely disclosure. (See CALCRIM No. 336;[3] CALJIC No. 3.20;[4] § 1054.4, subd. (b).) Any error was harmless under any standard. (*People v. Souza* (2012) 54 Cal.4th 90, 135; *People v. Hovarter* (2008) 44 Cal.4th 983,1022.)

E. Sufficiency Of The Evidence The Crime Was Committed To Benefit A Criminal Street Gang

Defendant challenges the sufficiency of the evidence he committed the murder for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Defendant argues there was only evidence of a personal dispute with Mr. Ingram. There was no evidence, according to defendant, of any gang disapproval of Mr. Ingram. Further, Detective Richardson had no personal knowledge of defendant. Detective Richardson had only

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[3] CALCRIM No. 336 states: "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case. [¶] [An *in-custody informant* is someone[, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose testimony is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution.] [¶] [<*insert name of witness*> is an *in-custody informant*.] [¶] [<*insert name of institution*> is a correctional institution.]" (CALCRIM No. 336 (Jan. 2006 Rev.)

[4] CALJIC No. 3.20 provides in part: "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case."

seen defendant in the community. More to the point, Detective Richardson never had any personal contact with defendant. In addition, defendant challenges Detective Richardson's opinion concerning any benefit that accrued to the gang as a result of Mr. Ingram's murder. Our review is for sufficiency of the evidence. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170-1172; *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Defendant was an active member of the street gang when Mr. Ingram was shot. Defendant previously had expressed a desire to kill Mr. Ingram. Mr. Ingram was, in defendant's view, a "snitch." Mr. Ingram had "filed" a police report naming other gang members as the perpetrators of a crime against Mr. Ingram. Mr. Ingram was also trafficking in drugs in a manner detrimental to defendant's financial interest. According to Detective Richardson, both defendant and Mr. Ingram were older gang members. Under these circumstances, it would not be unusual for defendant to kill another older gang such as Mr. Ingram for being an informant. Likewise, if defendant disapproved of where Mr. Ingram was trafficking in narcotics, a killing could send a message to younger gang members that such behavior is not tolerated. It also elevates the murderer's status within the gang. In this way, a murder such as occurred in the present case is for the benefit of the gang. This was substantial evidence supporting the jury's finding defendant's criminal act was for the benefit of a criminal street gang. (See *People v. Albillar, supra,* 51 Cal.4th at p. 63; *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19.)

F. Cumulative Error

Defendant asserts cumulative prejudice. However, as explained, there was no prejudicial error. Therefore, defendant's cumulative prejudicial error argument has no merit. (*People v. Tully* (2012) 54 Cal.4th 952, 1061; *People v. Dement* (2011) 53 Cal.4th 1, 58.)

G. Sentencing

1. Section 12022.53

The trial court sentenced defendant to an additional 25 years to life under section 12022.53, subdivision (d). Under an incorrect section 654, subdivision (a) analysis, the trial court stayed punishment for the section 12022.53, subdivision (b) and (c) enhancements. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.) The trial court should *have imposed and then stayed* consecutive 10 and 20 year terms under section 12022.53, subdivisions (b) and (c) respectively. (*People v. Gonzalez, supra*, 43 Cal.4th at p. 1130; *People v. Warner* (2008) 166 Cal.App.4th 653, 659.) The oral pronouncement of judgment must be modified to so provide.

2. Section 186.22, subdivision (b)(5)

Defendant was subject to a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004; *People v. Camino* (2010) 188 Cal.App.4th 1359, 1381-1382.) The 15-year minimum parole eligibility term for gang related homicides applies even when the accused has been convicted of first-degree murder with its 25 year minimum term. (*People v. Lopez, supra,* 34 Cal.4th at pp. 1008-1009; *People v. Camino, supra,* 188 Cal.App.4th at pp. 1381-1382.) Here, of course, defendant's minimum parole eligibility term is 75 years. Nevertheless, the judgment and the abstract of judgment must be amended to provide defendant is subject to a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5).

3. Court Operations And Facilities Assessments

The trial court imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)) and a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). However, the trial court was required to impose those assessments as to *each count* even though count 2 was stayed pursuant to section 654, subdivision (a). (*People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543, fn. 2; *People v. Sharret* (2011) 191 Cal.App.4th 859, 865; *People v. Woods* (2010) 191 Cal.App.4th 269, 272-273.) The judgment and the abstract of judgment must be amended to so provide.

4. State-Only Deoxyribonucleic Acid Penalty

The trial court imposed a $20 state-only deoxyribonucleic acid penalty pursuant to Government Code section 76104.7, subdivision (a). This was error. The state-only deoxyribonucleic acid penalty is imposed in addition to the penalty imposed under Government Code section 76104.6, subdivision (a). (Gov. Code, § 76104.7, subd. (a) ["in addition to the penalty levied pursuant to Section 76104.6"].) No Government Code section 76104.6, subdivision (a) penalty was imposed in this case. Moreover, the state-only deoxyribonucleic acid penalty is "levied . . . upon every fine, penalty, or forfeiture imposed and collected" for all criminal offenses. No applicable fine, penalty or forfeiture was imposed in this case. (*People v. Valencia* (2008) 166 Cal.App.4th 1392, 1394-1396; 3 Witkin, Cal. Crim. Law (4th ed. 2012) Punishment, § 104, p. 199.) Section 1465.8, subdivision (b) states, ". . . The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code[, including Government Code section 76107.7,] . . . do not apply to this assessment." Government Code section 70373, subdivision (b), contains identical language. Therefore, neither the court operations assessment nor the court facilities assessment is subject to a state-only deoxyribonucleic acid penalty. (See *People v. Valencia, supra,* 166 Cal.App.4th at pp. 1394-1396.)

V. DISPOSITION

The judgment is modified to impose and stay consecutive 10 and 20-year terms under Penal Code section 12022.53, subdivisions (b) and (c). The judgment is further modified: to impose a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)) and a $30 court facilities assessment as to each count; to omit the $20 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)); and to reflect that defendant is subject to a 15-year minimum parole eligibility term under Penal Code section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed. Upon remittitur issuance, the abstract of judgment must be amended to reflect the foregoing modifications. The clerk of the superior court shall deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.